

Title

Trustee's duty to defend trust property from third-party claims versus trustee's duty to defend trust's very existence, as well as its material provisions

Text

A longstanding and critical incident of a trustee's fiduciary duty of loyalty is the duty to vigorously defend the trust's very existence, as well as all its material provisions (hereinafter "existence defense"), unless it is patently futile or otherwise unreasonable to do so. The trust's existence might be attacked by a "voider" who would benefit upon judicial imposition of a resulting trust. A material provision might be attacked by a UTC §415 "reformer" who seeks a court order that would judicially include him in a class of beneficiaries to which he had been expressly and unambiguously excluded in the provisions of the trust's governing instrument. For more on the existence defense, see §6.2.6 of *Loring and Rounds: A Trustee's Handbook* (2024), which section may be downloaded below. See Appendix A.

The existence defense is not to be confused with the trustee's fiduciary duty to oppose third-party questionable or unjustifiable claims in contract and tort that could ultimately be satisfied from the trust estate (hereinafter "claims defense"), an exception being when it would be prudent and in the interest of the trust estate to compromise or honor a particular claim. For more on the claims defense, see §6.2.1.3 of the Handbook, the relevant portions of which section may be downloaded below without charge. See Appendix B.

The Uniform Trust Code does not tamper with equity's existence-defense doctrine. It just ignores it. Thus, whether principles of equity supplement the UTC or vice versa, the latter actually being the case, by default the trustee's fiduciary duty in equity to defend the trust, as well as its material provisions, remains very much in force. On the other hand, the UTC would codify aspects of equity's claims-defense doctrine. See UTC §811, and its official accompanying commentary.

This asymmetry is unfortunate in that those whose trust-law research misguidedly begins and ends with the UTC are misinterpreting UTC § 811 as some kind of statutory conflation of existence-defense doctrine and claims-defense doctrine. Understandable because the text of § 811 speaks only generally of "claims against the trust," ignoring the fact that an existence claim and a contract or tort claim implicate very different fiduciary considerations. See generally 3 Scott & Ascher §17.10. The implied assumption of the accompanying official commentary, however, is that the provision is not about existence claims, only about third-party claims against the trust property.

Why, then, is there not corresponding codification, partial or otherwise, of equity's prevailing existence-defense doctrine in the UTC? If the omission is intentional, perhaps it is to subtly buttress the UTC's now much discredited "intent-defeating" benefit-of-the-beneficiary rule. See my July 1, 2016 JDSUPRA posting on the subject: <https://www.jdsupra.com/legalnews/another-rejection-of-the-intent-defeat-69271/>.

Appendix A

§6.2.6 *Duty to Defend the Trust Against Attack; Duty Not to Attack the Trust; Indirect Attacks (Construction Proceedings)* [from *Loring and Rounds: A Trustee's Handbook* (2024)].

The trustee's duty to defend the trust. The trustee has a duty to defend the trust.⁷⁸³ The trust may be attacked by those who have an economic interest in bringing about its cancellation or termination.⁷⁸⁴ It may be attacked by those who oppose its purposes.⁷⁸⁵ To fail to mount a vigorous defense is to thwart the intentions of the settlor and may be grounds for the trustee's removal. Moreover, the trustee would be liable to the beneficiaries for any injury occasioned by an unwarranted capitulation.⁷⁸⁶

However, if it is clear to a reasonable person who has sought and obtained independent, competent legal advice that an attack is warranted or that resistance would be futile, then a defense should not be mounted.⁷⁸⁷ This exception would not apply when there is reasonable uncertainty as to the facts or the law.⁷⁸⁸

The trustee must do what is necessary within the bounds of law and reason to defend the trust and thus may retain counsel for that purpose and is entitled to have the costs of such representation absorbed by the trust.⁷⁸⁹ All reasonable appeals should be taken.⁷⁹⁰ The trustee who is unprepared to go the distance should seek to have the trusteeship transferred to someone who is. He probably should not have accepted the trust in the first place.

In a declaratory judgment or instructions action to determine the intended beneficiaries of a trust and/or their relative equitable rights, should the trustee defend its terms as written or take no sides? True, the trustee has a duty to defend the trust. The trustee, however, also is saddled with a duty of impartiality, which is the subject of §6.2.5 of this handbook. Can these duties be reconciled when it comes to complaints for instruction and declaratory judgment actions? Should the trustee actively participate, or assume a neutral posture? It depends.

It would seem that the trustee may safely assume a neutral posture⁷⁹¹ once he has assured himself that all parties, including the unborn and unascertained, are properly represented.⁷⁹² On the other hand, if the

⁷⁸³See generally Bogert §581. See also 2A Scott on Trusts §178.

⁷⁸⁴See generally Bogert §581. See also 2A Scott on Trusts §178.

⁷⁸⁵See generally Bogert §581. See also 2A Scott on Trusts §178.

⁷⁸⁶See generally Bogert §581. See also 2A Scott on Trusts §178.

⁷⁸⁷See generally Bogert §581. See also 2A Scott on Trusts §178.

⁷⁸⁸See generally Bogert §581. See also 2A Scott on Trusts §178.

⁷⁸⁹See generally Bogert §581. See also 2A Scott on Trusts §178. See generally 3 Scott & Ascher §18.1.2.4 (noting also that the trustee can properly "pay out of the trust estate the expenses of resisting an attempt by the beneficiaries to terminate the trust prematurely").

⁷⁹⁰Bogert §581; 2A Scott on Trusts §178. See P.H. Vartanian, Annot., *Right of Trustee of Express Trust to Appeal from Order or Decree Not Affecting His Own Personal Interest*, 6 A.L.R.2d 147 (1949).

⁷⁹¹See generally 3 Scott & Ascher §17.10. Cf. 3 Scott & Ascher §18.1.2.4 (noting that "if the trustee is reasonably in doubt about the terms of the trust or the scope of the trustee's duties or powers, the trustee can properly incur the expense of a judicial proceeding to construe the terms of the trust or for instructions").

⁷⁹²See generally 3 Scott & Ascher §17.10. See *Hershatter v. Colonial Trust Co.*, 73 A.2d 97 (Conn. 1950) ("Speaking generally, however, we believe that, where an attack is being made upon the validity of the trust, the trustee has the duty of participating actively in its defense. But where he acts, as in the case

action is actually a vehicle for attacking the trust itself, *e.g.*, if there are allegations that the trust was the product of fraud, duress, or undue influence, then the trustee is duty bound to advocate for the trust's validity,⁷⁹³ unless to do so would be self-evidently futile or otherwise unreasonable.

The duty to appeal. Likewise, if the judgments that are ultimately issued by the trial court amount to a “total or partial destruction of the trust,” then the trustee may have a fiduciary duty to appeal to a higher court if to do so would be reasonable and in the interests of the beneficiaries.⁷⁹⁴ Unless an appeal would be self-evidently unreasonable and/or futile, then its costs may be borne by the trust.⁷⁹⁵

Divorce proceedings. The trustee is not relieved of the duty to defend the trust and its dispositive terms just because the beneficiary happens to be getting divorced. The trustee's primary allegiance is to the beneficiary, not to the nonbeneficiary spouse or ex-spouse, unless the express terms of the trust provide otherwise. Thus, when there is marital discord, the trustee must suppress any personal feelings as to who may be at fault and vigorously defend—within reason and to the extent the law allows—the beneficiary's equitable property interest. As the English say, “[t]rustees have the custody of the property: they do not keep the conscience of their beneficiary.”⁷⁹⁶ A trustee may even have a fiduciary duty to challenge, at trust expense, a charging order against discretionary distributions that interferes with the trustee's ability to carry out the settlor's intentions. “Although the process and division may reflect the concept of marriage as a shared enterprise or partnership, this process and division likely will be counter to the intent of the trust's settlor and perhaps will require the participation of the family members of a beneficiary in the proceedings.”⁷⁹⁷ Reaching equitable interests in the context of divorce proceedings is taken up in §5.3.4.1 of this handbook.

The trustee's duty not to attack the trust. The trustee being a fiduciary, he may not mount an attack against his own trust.⁷⁹⁸ It has been said that the trustee, having accepted the trust, is “estopped” from then setting up its invalidity.⁷⁹⁹ At minimum, such acts of betrayal are grounds for removal. This would include attacks on only some of the equitable interests. Take the mistake-based reformation suit.⁸⁰⁰ Legal title to the property of a trust being in the trustee, it is likely that the trustee would have standing to bring such an action.⁸⁰¹ Whether under equitable principles the trustee should do so is another matter. If the trustee is seeking to bring about a reordering of the equitable property interests at the expense of one or more of the beneficiaries designated within the four corners of the governing instrument, then his initiating the reformation action, and certainly his appealing of any lower court decision not to reform, would be difficult

before us, merely as a defendant stakeholder, he ordinarily has neither duty nor right so to participate, particularly where all interested distributees are represented by capable counsel.”).

⁷⁹³See generally 3 Scott & Ascher §17.10.

⁷⁹⁴3 Scott & Ascher §17.10.

⁷⁹⁵See generally 3 Scott & Ascher §17.10.

⁷⁹⁶Lewin ¶20-161 (England).

⁷⁹⁷Marc A. Chorney, *Interests in Trusts as Property in Dissolution of Marriage: Identification and Valuation*, 40 Real Prop. Prob. & Tr. J. 1, 3 (Spring 2005).

⁷⁹⁸See generally Bogert §581; 2A Scott on Trusts §178 (“Clearly, the trustee owes a duty to the beneficiaries not to destroy the trust”); P.H. Vartanian, Annot., *Right of Trustee of Express Trust to Appeal from Order or Decree Not Affecting His Own Personal Interest*, 6 A.L.R.2d 147 (1949).

⁷⁹⁹See generally Bogert §581; 2A Scott on Trusts §178 (“Clearly, the trustee owes a duty to the beneficiaries not to destroy the trust”); P.H. Vartanian, Annot., *Right of Trustee of Express Trust to Appeal from Order or Decree Not Affecting His Own Personal Interest*, 6 A.L.R.2d 147 (1949).

⁸⁰⁰See generally §8.15.22 of this handbook (reformation actions).

⁸⁰¹See, *e.g.*, Reid v. Temple Judea & Hebrew Union Coll. Jewish Inst. of Religion, 994 So. 2d 1146 (Fla. Dist. Ct. App. 2008).

to square with his fiduciary duties of loyalty and impartiality, not to mention his duty to defend the trust.⁸⁰² Even as a nominal defendant in a mistake-based reformation action brought by someone else, the trustee should be wary of taking a position that amounts to a constructive attack on the equitable interests of any designated beneficiary.

The Uniform Trust Code. The UTC neglects to “state” in its Article 8 the trustee’s critical common law duty to defend his or her trust. But the UTC also neglects to expressly negate the duty. Thus, the duty remains very much alive and well in the jurisdictions that have enacted the UTC.⁸⁰³ “The UTC is supplemented by the common law of trusts and principles of equity.”⁸⁰⁴ Actually, vice versa is more precise. In any case, the application of the doctrines of deviation, reformation, modification, and rectification, topics we take up generally in §8.15.22 of this handbook, are constrained and tempered by the trustee’s duty to defend. The UTC’s failure to expressly “state” the trustee’s duty to defend is a trap for the unwary trust professional who labors under the misconception that in any given situation all applicable trust law lurks only within the UTC’s four corners. What applies to the trustee’s duty to defend the trust applies also to his or her duty not to attack it.

Appendix B

§6.2.1.3 Duty to Protect and Preserve Trust Property; Duty to Enforce Claims; Duty to Defend Actions [from *Loring and Rounds: A Trustee’s Handbook* (2024)]

Claims by and against third parties. A trustee shall take reasonable steps to enforce claims of the trust against third parties and, as we shall see, to defend claims against the trust by third parties.¹⁶⁰ (One court has even found that a trustee had a duty to enforce a claim against a contingent remainderman that predated the trust).¹⁶¹ Accordingly, the trustee has full power to sue on behalf of the trust estate and to defend suits that put the trust estate at risk.¹⁶²

One court has authorized a trustee to assign away *for adequate consideration* a trust claim against a third party.¹⁶³ The assignee was better equipped to prosecute the claim, the trust being cash-starved and no lawyer being found willing to take the matter on a contingent fee basis. The court found 55 percent of any recovery to be adequate consideration. This contractual right to a percentage of the recovery replaced the claim as a trust asset.

⁸⁰²See §6.1.3.6 of this handbook (breaches of the trustee’s duty of loyalty that do not involve self-dealing) and §6.2.5 of this handbook (the trustee’s duty of impartiality).

⁸⁰³See, e.g., *Shriners Hosps. for Children v. First N. Bank of Wyo.*, 373 P.3d 392 (Wyo. 2016).

⁸⁰⁴UTC, General Comment to Article 1.

¹⁶⁰UTC §811; Rest. (Third) of Trusts §76 cmt. d. See also 3 Scott & Ascher §§17.9 (Duty to Enforce Claims), 17.10 (Duty to Defend Actions); 2A Scott on Trusts §178; Bogert §581. Cf. §6.2.6 of this handbook (trustee’s duty to defend the trust against attack, and certainly not to attack the trust).

¹⁶¹See, e.g., *New Haven Sav. Bank v. LaPlace*, 66 Conn. App. 1, 783 A.2d 1174 (2002) (noting that the defendant failed to cite any law holding that a trustee must forbear foreclosing a mortgage on a note held by the trust because the maker of the note is a contingent remainderman).

¹⁶²See Bogert §§594, 869; §6.2.6 of this handbook (trustee’s duty to defend the trust against attack, and certainly not to attack the trust).

¹⁶³See *Dunmore v. Dunmore*, No. C063910, 2012 WL 267725 (Cal. Ct. App. Jan. 30, 2012) (unpublished).

The trustee's duty to prudently litigate. Again, the trustee of a trust that is strapped for cash has no obligation to use his personal funds to underwrite remedial litigation¹⁶⁴ or litigation to collect insurance proceeds or other assets due the trust, unless the beneficiaries are willing to foot the bill with their own funds, although there may be an affirmative duty to solicit their voluntary indemnity.¹⁶⁵ “A trustee who can obtain the necessary funds by a sale or a mortgage of trust property may be under a duty to do so,”¹⁶⁶ provided it is reasonably likely that the costs of selling or encumbering the trust property is worth the benefits that could reasonably be expected to be obtained from the litigation. In any case, a trustee who is contemplating serious litigation at trust expense would be well advised to seek a second legal opinion before proceeding.¹⁶⁷ He may even have a fiduciary duty to do so. Perhaps taking security for the claim in lieu of litigating it is a better option.¹⁶⁸ Or possibly putting the collection process on temporary hold would be a better way to go, provided there is a chance that doing so would increase the chances of a satisfactory resolution of the matter.¹⁶⁹ Likewise, a trustee has no duty to employ personal funds to fend off claims *against the trust estate*, unless the claims have been occasioned by some breach of trust.

As a general rule, all demands must be pressed, even to the extent of bringing suit,¹⁷⁰ or else the trustee will be liable for any loss caused by unjustified forbearance.¹⁷¹ Take, for example, the trustee who holds legal title to contractual rights against a third party, such as rights against the corporate issuer of a bond or rights against an insurance company incident to an insurance policy. The third party, instead of making a payment to the trustee, who is the other party to the contract, takes it upon itself to make a payment directly to a trust beneficiary who is not of full age and legal capacity. The trustee may have a fiduciary duty to seek to compel the third party to make the payment a second time, this time to the trustee.¹⁷²

A trustee who is unsuccessful at the trial level in pressing a claim may have a duty to appeal the decision to a higher court, provided it would be reasonable and in the interests of the beneficiaries to do so.¹⁷³ “The

¹⁶⁴Lewin ¶21-50 (England).

¹⁶⁵Rest. (Third) of Trusts §76 cmt. d. *See generally* 3 Scott & Ascher §17.8; 2A Scott on Trusts §175.

¹⁶⁶3 Scott & Ascher §17.8.

¹⁶⁷*See also* §8.25 of this handbook (noting that trustees can no longer assume that every lawyer has been exposed in an academic setting, or anywhere for that matter, to the fundamentals of agency and trust law).

¹⁶⁸*See generally* 3 Scott & Ascher §17.9 (noting that “it may be reasonable for the trustee to take security for the claim, even if doing so would not otherwise be part of a prudent investment strategy for the trust”).

¹⁶⁹*See generally* 3 Scott & Ascher §17.9.

¹⁷⁰*See* 3 Scott & Ascher §17.9; 2A Scott on Trusts §177; UTC §812. *See, e.g.,* PriceWaterhouseCoopers, LLP v. Bassett, 666 S.E.2d 721 (Ga. Ct. App. 2008) (trustees of interests in a now bankrupt business enterprise successfully brought suit against its corporate accountants for negligently misrepresenting the financial condition of the enterprise, a misrepresentation that had induced the trustees to acquire the interests for various family trusts).

¹⁷¹*See* 3 Scott & Ascher §17.9; 2A Scott on Trusts §177; UTC §812.

¹⁷²The third-party obligor who makes a payment directly to the trust beneficiary instead of to the title-holding trustee, the other party to the contract, does so at his, her, or its peril, unless directed to do so by the trustee. 5 Scott & Ascher §32.1 (Discharge by Beneficiary of Claim Against Third Person). If the beneficiary is not of full age and legal capacity, the third-party obligor runs the risk of having to pay twice. 5 Scott & Ascher §32.1 (Discharge by Beneficiary of Claim Against Third Person). There is a similar risk if following the direction were to constitute a knowing participation with the trustee in a breach of trust or if the trust were a spendthrift trust. 5 Scott & Ascher §32.1 (Discharge by Beneficiary of Claim Against Third Person).

¹⁷³*See generally* 3 Scott & Ascher §17.9 (noting that the trustee generally has “wide discretion” whether or not to appeal and risks being second-guessed only when there has been an abuse of that discretion).

trustee is not excused from enforcing a claim merely because the settlor would not have pressed it or because of generous feelings for the obligor.”¹⁷⁴ On the other hand, it may be in the economic interest of the beneficiaries, and therefore prudent and reasonable, to forbear or to compromise a claim or submit it to arbitration.¹⁷⁵ Because of the attendant expense to the trust, the patently futile prosecution of a claim itself can constitute a breach of the specific duty to protect the trust property.¹⁷⁶ State statutes authorize a trustee to compromise, usually with court approval.¹⁷⁷

Imprudently compromising claims by and against the trust estate. In the absence of express authority in the governing instrument to do so, the trustee inclined to compromise a claim should check for an applicable statute. If one is found, its provisions should be followed. In the absence of such a statute, the trustee has two options: to obtain the consent of the current beneficiaries and remaindermen, if feasible, or to seek court approval. Note: If the claim is *de minimis*, taking such precautions would not be commensurate with the trustee’s potential liability and thus could constitute a breach of the trustee’s duty of loyalty, and ironically his duty not to waste the trust property.

Ordinarily, the trustee has a duty to defend third-party actions that might result in a loss to the trust estate, and to appeal adverse decisions to the extent it is reasonable and in the interest of the beneficiaries to do so.¹⁷⁸ “It might also be reasonable to settle an action or suffer a default rather than to defend an action.”¹⁷⁹ Consuming trust property in a patently futile defense of a claim against the trust estate can itself constitute a breach of trust. At minimum, the trustee risks personal liability for the defense costs.¹⁸⁰

¹⁷⁴3 Scott & Ascher §17.9 (noting that “[t]he trustee may not be generous, at the beneficiaries’ expense”).

¹⁷⁵See Rest. (Third) of Trusts §76 cmt. d; Rest. (Second) of Trusts §192; 3 Scott & Ascher §17.9.

¹⁷⁶See Rest. (Second) of Trusts §192 cmt. c; 3 Scott on Trusts §192; §6.2.6 of this handbook (the trustee’s duty to defend the trust against attack, and certainly not to mount an attack against the trust).

¹⁷⁷See 3 Scott on Trusts §192.

¹⁷⁸See generally 3 Scott & Ascher §17.10.

¹⁷⁹UTC §811 cmt. See generally 3 Scott & Ascher §17.10.

¹⁸⁰See, e.g., *In re Beddoe* (Downes v. Chatham) [1893] 1 Ch. 547 (Eng.).